Planning and Dev Bill consultation draft 2022

comments from David Dunstan

I would like to congratulate the team working on this review of planning legislation. I think the new bill is vastly more clear, simple and effective than the existing legislation in particular with the removal of code/merit tracks, the establishment of a design review panel, simplification of provisions for exempt development and many other measures.

The below are thought bubbles on what for me personally might perhaps be even more icing on the cake.

Exempt development

Section 141 of the Bill defines exempt development by reference to the regulation. This seems an excellent simplification from the current Act which defines exempt development as development listed in either the Territory Plan or the regulation which seems unnecessarily complex and risking confusion if the wording of the regulation and the Territory Plan were at odds. I think this is an excellent change.

The exemption regulation is itself still quite complex and perhaps inevitably so given the diverse areas it must cover, but perhaps there is room for further simplification of the exemption regulation?

Prohibited development s151(2) – prohibited unless exempt

Section 151 of the Bill defines prohibited development as development identified in the Territory Plan as prohibited. Section 151(2) effectively provides that prohibited development does not include exempt development (ie development exempt under an exemption regulation). Unlike the approach to exemptions, in respect to prohibitions a reader must look at both the regulation and the Territory Plan to determine what is prohibited or not.

The section 151(2) exemption provision re prohibited development would seem to raise some issues, including:

- A potential for misuse by a future government. In theory a government keen on tourism could declare that a gondola in Namadgi is exempt and so avoid any prohibited development requirement applying.
- Complexity – the provision means you must look in two places to determine whether a development is prohibited ie you must look both in the Territory Plan and the separate exemption regulation
- The setting up of an apparent contradiction as follows. The Act sets up a process for amending the territory plan including public consultation etc (eg sections 51-86). These process requirements would apply if the territory plan were proposed to be amended by deleting an item from the list of prohibited development. However, if effectively the same change were made by an exemption regulation under s151(2) these same amendment processes would not apply. In this sense the exemption regulation could be seen as a potential method for bypassing the Territory plan amendment process. And there may be questions about the legitimacy of an exemption regulation for this reason.

These issues may have limited practical importance if in practice exemptions remain relatively minor but there is no legislative guarantee this will continue to be the case.

Perhaps there should be limits on the operation of s151(2) to safeguard against possible future misuse.

Or perhaps section 151(2) could be removed and instead any required exemptions be incorporated directly into the wording of the prohibitions themselves in the Territory Plan. The disadvantage of this approach is that it would remove the ability to make an exemption adjustment quickly by regulation if this became necessary as a result of new technology or unanticipated difficulties, instead a Territory Plan amendment would be required potentially taking several months. However this time difficulty could be reduced by use of a Territory Plan amendment with immediate interim effect under section 61.

Consultation with lessees and tenants

In several instances the Bill rightly requires lessees (ie landowners) to be consulted in connection with a proposed development in adjoining land eg s172. In addition Section 506 of the Act gives lessees of relevant land who are not the development applicant an automatic right of ACAT merit review.

Given the rising cost of owning land and the consequent increasing proportion of people who do not own their residence, should such provisions be expanded? Why should a tenant not have similar rights to consultation and review as a lessee/landowner? Is it now time to give at least long term tenants the same rights of consultation and review as lessees? Such a move would seem consistent with the emphasis on community participation in the objects of the Act set out in s7.

There may be practical difficulties with such an expansion of consultation rights. There is a list(s)of lessee names set out in the land titles register or other registers that can be used in sending out notices to lessees. There is however no up to date list of tenants that the Authority can refer to in order to send out notices. This could perhaps be overcome with letters addressed generally to tenants of the relevant land but these might be mislaid or discarded, I often do not read letters addressed "to the householder". Alternatively, provision could be made to give tenants the opportunity to put themselves on a register so that they will be individually notified in the event of a nearby development. Tenants could choose whether to opt in to such a register or not. Notice to tenants about the opportunity to participate in such a register could be required under the Residential Tenancies Act.

Territory Priority Project

Given the significance of a territory priority project should the legislation require that a declaration be made by, or made with the agreement of, the Chief Minister? This would be a powerful symbol that such declarations represent the intent of the whole Government and have the full backing of the head of government.

Increased discretion and the role of ACAT merit review

The new legislation simplifies the existing legislation in many ways including by getting rid of the code and merit tracks and associated code rules. This simplification seems very welcome.

In making this simplification, the new legislation might in some respects also expand the scope for the exercise of discretion by the Planning Authority and also ACAT merit review of development approval decisions. There were provisions in the existing Act which sought to remove from ACAT merit review any discussion of a part of a development that complied with a code rule (eg s121(2) and items 3, 4 of schedule 1). In other words if a part of a development complied with a black and white rule then it could not be revisited on ACAT merit review. This limit (and complexity) appears to be gone under the Bill.

This seems logical, if under the new legislation the discretion of the planning authority is to increase (ie less black and white rules) then it would seem appropriate that the purview of ACAT under the merit review process also increase.

At the risk of going out on a lonely limb, I don't think this is necessarily a good thing. Increased scope for ACAT merit review also risks increased litigation, delay and uncertainty, irrespective of the quality of ACAT decision making. I think there should be accessible, affordable avenues to challenge a planning decision on the basis that the decision did not follow required processes or was otherwise unlawful. I think it is much less clear why there should be access to merit review of a planning decision with the cost and delay involved.

Under s68(2) of the *ACT Civil and Administrative Tribunal Act 2008* the tribunal has broad powers to make any decision that the original decision maker made. And this could play out as follows. The scenario in mind, is: – the planning and land authority makes a planning decision that follows proper consultation and assessment processes and results in a decision that is a reasonable one in terms of the objects/requirements of the Territory Plan and related legislation. The decision is the subject of a merit review application and is heard by ACAT. ACAT finds that the decision is lawful but ACAT prefers its own different view of what best meets the planning requirements and so nullifies the planning authority decision and substitutes its own decision (or substitutes part of the decision …). In this scenario both the original planning authority decision and the ACAT decision are reasonable, they are just different subjective interpretations of how to apply a planning objective to the particular development.

In this case why is the ACAT decision to be preferred over the original decision? If a planning decision is made and the required process is correctly followed and the result is consistent with the plan and the law – why should there be ACAT merit review? Why should the planning opinion of ACAT be preferred over the planning opinion of the Chief Planner? Both bodies have planning expertise and both are independent statutory bodies and both are required to avoid conflicts of interest (the Chief Planner cannot be involuntarily removed except through an Assembly process), what then is benefit in substituting an ACAT merit review decision? What in this circumstance is gained by the extra turn of the assessment/review wheel and the extra time, expense and uncertainty?

Given the goal of simplification is it worth revisiting the scope for ACAT merit review. Perhaps ACAT merit review could be restricted to consideration of process issues only ie:

- Whether the assessment and decision followed required procedures including whether required consultation took place
- Whether public comments were taken into account in decision making
- Whether the decision is not so unreasonable as to be unlawful

Increased discretion – and possible need for new independent review mechanism

As noted above, the new legislation simplifies the existing legislation in many ways including by getting rid of the code and merit tracks and associated code rules. And this would seem to expand the discretion of the planning authority in assessing and granting development applications. I think this extra flexibility is a good thing and will lead to better planning outcomes.

My understanding is that the original emphasis on black and white rules with code/merit track system (here and in other jurisdictions) was to reduce the potential for poor, inconsistent, arbitrary decision making by the relevant planning authority. I am not sure that the ACT ever particularly suffered from this and perhaps this was always a solution in search of a problem.

However, there may still be a concern that in the distant future there may be a risk that a reduction in rules, a reduction in the "guard rails" may open up a potential for future planning authorities to make poor planning decisions perhaps under pressure from calcified institutional thinking, lobby groups etc. I think such concerns are addressed in large part by the very stringent requirements in the Act for the planning authority to take due consideration of the Territory Plan, be independant, avoid conflict of interest, and also by the fact that the Chief Planner can only be subject to involuntary dismissal only by decision of the Assembly and many other related measures.

If it is considered that these measures are not enough, then perhaps the legislation could incorporate a second statutory voice, a second view to give the Legislative Assembly timely notice of the emergence of any such risk.

A new statutory office wholly independent of the planning authority could be created in the legislation tasked with the function of conducting regular audits to check that approval decision outcomes taken as a whole continue to effectively deliver on the required objectives of the Territory Plan. The statutory office could be required to make an annual report on this to the Legislative Assembly. If the Assembly after reading the report had concerns it could debate and recommend the Minister issue corrective directions to the planning authority.

The new office would be different to an ombudsman or similar as the office would have particular expertise in planning and be focused on planning outcomes as opposed to adherence to administrative procedures in particular cases etc. It is a very poor analogy but the only one I can think of, the new office could be similar to the inspector general oversight of secret service agencies at the federal level in making reports to the federal parliament.

Development approvals for use of land and conditions on such approvals

The Planning and Development Bill includes sections 143 and 144 on when development approval for use of land is required, in short on my reading it is required when works are carried out on the land and the works are not exempt ie the works require development approval. Development approval for use of the land is then required at this point and forever more afterwards. This principle seems similar to existing section 134 of the existing Planning and Development Act but is much much clearer in part because of the example used in section 144. And this seems a big step forward in the right direction.

I think though in this vein, the legislation in respect to use approvals could perhaps be made even more clear? Section 144 seems to imply that conditions can be imposed on

development approvals for use that restrict the use of land. This function I think could also be made more clear in the sections that apply to the granting of approvals and conditions on approvals ie sections 180-182. Overall these sections still read as though development approvals are primarily about works approval and approvals for use of land is a lesser order matter. I think these provisions could be amended to be more clear about the considerations for the granting and conditioning of use approvals, the following are not necessarily new provisions but provisions that could be more clear. The provisions could be revised to make it clear that:

- In granting a development approval, the planning and land authority can restrict the permitted uses of the land if this is necessary in light of the proposed development, eg if necessary it could remove "gym" as a permissible use in the case where the proposed development is a residential apartment block due to noise concerns; in other words make it clear that the Authority can not just condition a use but remove the available use entirely
- The wording could also make it explicitly clear that the planning and land authority can do this despite the use being authorised by the relevant lease or licence
- Make it clear that if a new use is required in association with a proposed development that the Authority can authorise the new use in the approval and if necessary require a variation of the lease to accommodate the new use;
- Make it clear that if the Authority considers that a use is not viable on the site and is not likely to be in the foreseeable future that it can require the lease to be varied to remove this as a lease authorised use if warranted
- Make it clear that a use restriction or condition can be time limited

The above type of provisions would need to be subject to the point in s144, 145 of the bill to the effect that use cannot be restricted for reasons not related to a proposed new works development.

In addition, to the above, it might be useful to consider how clear the documentation in the land titles register is to enable the landowner and future landowners to be fully aware of any use approval conditions/restrictions that might newly apply to the land. Is forwarding a copy of the approval to the registrar of lands for noting with the lease sufficient?

Development approvals for use, subject to other events, last forever. What happens if a second development approval re the land is granted which imposes new restrictions additional to restrictions that might apply as a result of an earlier development approval relating to use? Will the landowner have access to a consolidated set of use approvals/use conditions? Should this possibility be addressed through a requirement to always revoke existing use approvals when a new one is granted so that there is only ever one use approval in play?

Development approvals and conditions

In the above i referred to development approvals for use. Similar issues might apply for development approvals generally including approvals for works. In particular, the provisions might read more clearly if they expressly stated, perhaps with an example, that a development approval can be granted in a form which approves some but not all of the relevant works. For example application is made for a five story building but approval is granted for only a four

story building. In other words make it clear that what is approved can differ from what is applied for, taking into account the Territory Plan and guiding principles. This seems already implicit in the principles and condition powers but suggest it could be more clear.

Use approvals and leases

The existing *Planning and Development Act 2007* brought the ACT more into line with NSW and other jurisdictions by removing an artificial distinction between building works (requiring development approval) and land use (authorised by the lease) and recognised that both works and the use of land and use of buildings were types of development all requiring development approval.

In this current legislative review several years on, it is perhaps worth asking how well the integration of works and use into the development approval system has performed and how well it is now understood in the community. Could the structure that we now have for this integration be simplified further, made more efficient and more easily understood?

Currently, the ACT would seem to still have a patchwork system for the authorisation of the use of land and buildings. The use of land in national land and designated area land is governed entirely by leases not development approvals. Land management agreements associated with leases apply to rural land.

In urban Territory Land in some cases the use of land is wholly authorised by a lease and in other cases (in circumstances where building work takes place or has taken place and as a result section 134(2) applies), the use of land requires authorisation by both the lease and a development approval for use. In other words, land can move from being in a state where use is wholly governed by the lease to a state where use is governed by both a lease and use approval.

This system seems overly complicated. I wonder how many people understand how development approvals for use and leases work together as a result of the operation of section 134 (reproduced with some much appreciated clarification in section 144 of the Bill). How many purchasers of land realise they need to check whether the use of land is governed by a development use approval that is held with the lease in the land titles office, and what to look for to work this out?

What happens if works are carried out on the land triggering the operation of section 134(2) (144 in the bill) but mistakenly development approval is not sought for the works or the development approval is granted but somehow not linked or linked clearly to the lease, in this case a purchaser of the land could be in the dark even if they looked in the right place?

Perhaps taking this further, existing section 134 and new section 144 of the Bill appear to permit at least in theory the following scenario. A landowner builds a new carport on the land and does so in the mistaken belief that the carport is exempt from requiring development approval but it is in fact quite large so in fact it does require development approval. The carport is built without the required development approval for the works. The fact that the carport is built means that in theory s134(2) is triggered. This would seem to be the case even if no approval is sought or granted. This has the result that the land transitions from the state of only requiring a lease for use authorisation to the state of requiring both a lease and development approval for use authorisation. But the landowner and prospective landowners

do not know this because there is no documentation. In a practical sense this might not matter so much because this circumstance will not likely be recognised or acted on by anyone. But legislation that opens up the possibility of such a scenario seems deficient.

My suggestion is to consider retaining the integration of use and building works ie continue to recognise that both are forms of development requiring authorisation (as per existing s7(1)(d)) but reconsider the form of authorisation. In my view the world of use authorisations would be much simpler if the form of authorisation for the use was in all circumstances the same. And would be simpler again if the form of authorisation is the lease rather than a development approval. I think this would have the following advantages:

- Would simplify the legislation by removing the need for complex provisions like section 144 of the Bill;
- Would put in place a system that accords more closely with community understanding which I assume is to the effect that it is the lease that authorises use
- Would be a simpler system in that all of the ACT (national land, designated area land etc) in all circumstances there would be one type of use authorisation rather than the patchwork quilt referred to above
- A purchaser of land would have to navigate only one document re the use status of the land, ie the lease, rather than having to look at a linked development approval in the land titles register and possible use conditions on the approval.

Also I would suggest that everything that can currently be done with development approvals for use can also be done with leases including conditioning use, restricting use, authorising new uses, time limiting conditions on use etc. In particular, it seems to me the Territory Plan and planning legislation requirements re assessing use and considering use conditions and use authorisations can all apply equally well to leases as well as development approvals.

This approach would be different to NSW and other jurisdictions, but the ACT is already necessarily different irrespective of the continued role of development approvals for use. This is because we already have and will retain a leasehold system. And it is a system that already and will whatever direction we take, continue to play a large part in authorising use.

Leases typically last 99 years, so some might consider that use authorisations should not last this long. But development approvals for use (unless otherwise restricted) will last indefinitely and so in this respect also there is no difference between leases and use approvals.

In conclusion, I think that the different forms of authorisation for use development approval or lease is a distinction that comes at a cost for complexity and efficiency with little or no net benefit.

National land

A significant part of the land in the ACT is national land, governed by the National Capital Plan and commonwealth leases etc. It would perhaps assist readers and users of the planning legislation and Territory Plan if the legislation included an upfront statement to the effect that the planning legislation does not apply to national land. It would also assist if the Cth agreed to amend the Cth Planning and Land Management Act to make it more immediately clear that

Territory Plan and territory planning legislation does not apply in national land, as the current provisions seem less than clear on this.

Leases in designated areas

Section 4 of the Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth) defines designated area land. The territory plan does not apply to variation of leases in designated areas (section 150 of the bill). There seems a question as to what principles should apply to approval decisions on such lease variations. Section 181 of the Bill does not seem to provide much criteria or guidance re this, should the Bill make it more clear what are the principles that apply in this case?

Other matters related to the Commonwealth

Accept that it is beyond the scope of this review to establish a single Territory Plan for the ACT (ie merger of national plan and Territory Plan). Suggest that there may be other smaller steps for better coordinating Territory and NCA requirements short of this that may be worth considering in conjunction with this legislation review especially given that we now have a new Commonwealth (Cth) government. For example:

- The Cth, following discussions, could exempt requirements for work approvals in designated areas and so permit these areas to be subject to Territory development approval (currently the ACT administers leases in designated areas but not building work development);
- Cth could (with appropriate funding from the Cwth) delegate enforcement of Cwth works approvals in national land and designated areas to the Territory, for more consistent and more effective enforcement processes overall;
- Cth could agree to better coordinate with the ACT any release of national land into Territory land. This could help make sure that any such land is not sold or allowed to be developed by the Cth without proper assessment under the Territory Plan and proper integration into territory land management processes.
- Cth could revise its community consultation processes so that they are consistent with Territory consultation processes as far as practical
- Cth could revise its approval review processes so that they are more consistent with ACT review processes
- Cth could formally agree that major users of land like defence housing are and will remain subject to Territory planning laws, rather than being able to opt in or out on an ad hoc basis

In addition, the Cth could give consideration to amending sometimes overly prescriptive, paternalistic and confusing requirements in relation to Territory Planning administration. Section 25 of the Cth *Australian Capital Territory (Planning and Land Management) Act 1988* in particular seems overly prescriptive and at times unclear. Such paternalistic legislation does not seem appropriate now that the Territory has had self government for a very long time.